88-409

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

No. . . . . .

WILLIAM B. RICHARDSON,
Petitioner

v.

THE PEOPLE'S NATURAL GAS CO., et AL
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS

For the Third Circuit

No. 87 - 3697

WILLIAM B. RICHARDSON, *pro se*
149 Westmoreland Avenue
Greensburg, PA 15601

The Palace Printer, Greensburg, PA 15601

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QUESTIONS PRESENTED FOR REVIEW

1. Is it an abuse of discretion for the District Court to enter impromptu Dismissal with Prejudice during a settlement conference without prior notice to the pro se litigant of hearing with issuance of findings in clarification of such a hearing?

2. Is Dismissal with Prejudice the ultimate sanction for a litigant and not to be imposed without consideration of likely effectiveness of less stringent measures?

LIST OF PARTIES TO THE PROCEEDING

Plaintiff: (appearing pro se - not an attorney) William B. Richardson, 149 Westmoreland Avenue, Greensburg, Pa 15601

Defendants: PEOPLES NATURAL GAS COMPANY, a public utility operating in Western Pennsylvania and a subsidiary of Consolidated Gas Company, an interstate operator.

GERALD A. WILSON, Customer Service Foreman for Peoples.

The above represented by Jeffrey G. Brooks, Esquire, 42nd Floor U. S. Steel Building, 600 grant Street, Pittsburgh, Pa. 15219.

Defendants: PENNSYLVANIA PUBLIC UTILITY COMMISSION, Harrisburg, Pa.

JAMES D. PORTERFIELD, Administrative Law Judge
JOSEPH FARRELL, Director of Consumer Services
SARA J. COHICK, Consumer Service Representative

The above Commission and employees represented by Gloria Tischuk, Esquire, Deputy Attorney General, 4th Floor, Manor Bldg., Pittsburgh, Pa. 15219.

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS RENDERED BELOW

There were no official reports of opinions below in either the District Court or the Court of Appeals. The District Court referred to "the reasons set forth in the record of this case" in support of its Order of Dismissal with Prejudice (see A - 8).

The District Court deliberations following its announcement of the Dismissal with Prejudice are set out in the Appendix (page A - 1 to A - 7, September 24th, 1987 transcript).

A CONCISE STATEMENT OF JURISDICTIONAL GROUNDS

The Order of the United States District Court for the Western District of Pennsylvania (A - 8) was entered September 29th, 1987 and entered in the record the same day. The Third Circuit Court of Appeals confirmed the foregoing May 19th, 1988, and entered in the record the same day (A - 9).

Re-hearing denied in Court of Appeals. Order issued July 1st, 1988, (A - 10).

The statutory provision conferring jurisdiction to review by writ of Certiorari is Title 28 USC section 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTE

Article IV, Section 2: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Amendment Article (V): "nor shall any person . . . be deprived of life, liberty, or property without due process of law."

Title 28 USC section 1331: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

A CONCISE STATEMENT OF THE CASE

The complaint was filed November 4th, 1985. Service on all defendants was promptly made by mail but only the Attorney General responded for the record. Personal service was promptly instituted to enlist the Gas Company and its employee. Their representative entered appearance on December 30th, 1985.

A Judge did not appear in the case until October 29th, 1986 (nearly a year after complaint filed). Meantime, motions were filed by both sides including a Show Cause why Default Should Not be Entered by Plaintiff

and Motions to Dismiss by Defendants. No hearing was ever set on any Motion made by any party.

The first Court session was a status conference on November 21st, 1986. At that time, his Honor announced settlement in Order. Three such conferences followed. Plaintiff was in regular attendance at all times.

At the last conference (September 24th, 1987), plaintiff had a lawyer present to assist him with settlement. The Judge insisted that the lawyer enter his appearance as the Attorney of Record. Plaintiff had only made arrangements for that one conference. This seemed to upset his Honor somewhat and an abrupt Dismissal with Prejudice was entered. The Appendix (A - 1 to A - 7) reproduces that portion of the conference (Court Reporter transcript) of September 24th, 1987, relating to what the Court said about its reasons for issuing the Dismissal with Prejudice. Plaintiff had no prior notice that such a judgment would be handed down. There are no other findings available relating to this Order (see A - 8).

The plaintiff seeks damages for constitutional violations arising from conspiracy between the Gas Company and the Pennsylvania Utility Commission whereby they promote the unlawful practice of the Gas Company in manipulating its customers through its Customer Service Department. Each customer is charged $7.59 per month for maintaining this Department and it owes a duty to protecting the customer's interest. Instead, the Customer Service Representative

sees to it that gas meters are moved at the Customer's expense if there is a leak shown on the customers service line when the meter needs changing. To accomplish this, the Customer Service representative misrepresents the company's position to the customer. The utility commission backs the gas company. With this attitude, the Gas Company gets many meters relocated at the customer's expense. The law requires the Gas Company to pay for such meter relocations. (Title 66 PA C.S.A. 1501)

Beginning with the first meeting with the Judge, plaintiff advised he was ready for trial. The plaintiff filed with the Judge a transcript of the proceedings before the Utility Commission which substantiated the plaintiff's complaint and was in lieu of depositions. The Judge has refused to enter this transcript in the record. Plaintiff filed separately in the Court of Appeals to have the State transcript entered by the Judge (3rd Circ. Ct. of Appeals, 88-5116) and has written his Honor to request its filing but has been unsuccessful to this date.

BASIS FEDERAL JURISDICTION IN FEDERAL DISTRICT COURT

The statutes cited in the Complaint for jurisdiction of the District Court were Title 28 USCS sect. 1331 and Title 28 USCS sect. 1343.

ARGUMENT

The Writ should be allowed. As a procedural matter, the judgment of Dismissal with Prejudice was not properly approached. It came up suddenly and unexpectedly. None of the parties was prepared for it. For a complete text of the conference proceeding related to the Judge's reasons for Dismissal with Prejudice, Appendix beginning page A-1.

On appeal, the plaintiff argued as set out in this petition. The two attorneys - each representing different elements of defendants - confined their briefs to re-argument of the Motions to Dismiss that they had filed approximately three years previously in lieu of an Answer to the complaint. These attorneys obviously were under the impression that the District Court Judge had picked one of the points in their Motion to Dismiss and used it as the basis for the Dismissal with Prejudice.

No oral argument was allowed in the Court of Appeals. Judgment was on briefs alone. Only the short judgment order reproduced at page A - 9 of Appendix was issued.

"As the Court noted in Christiansburg, even if the law or the facts are somewhat questionable or unfavorable at the outset of litigation, a party may have an entirely reasonable ground for bringing suit. 434 US at 422, 54 L Ed2d 648, 98 S.Ct. 694" Hughes v Rowe 449 US 5, 15; 66 L. Ed2d 163, 173 (1980).

"--- it is clear enough from our recent cases that at the summary judgment stage the judge's function is not

himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v Liberty Lobby, Inc. 472 US -----; 91 L. Ed2d 202, 212, 1068 S. Ct. ------ (1986).

A case within the jurisdiction of a Federal district court under 28 USC sect 41 (now USC sect 1331) to try suits of a civil nature arising under the constitution or laws of the United States, is stated by a complaint seeking recovery of damages from Federal officers who violated their constitutional rights even though the Constitution and laws of the United States do not provide for recovery of money damages for such violations. Bell v Hood, 327 US 678, 90 L. Ed 939 (1946).

"Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. --- What the Constitution does require is 'an opportunity --- granted at a meaningful time and in a meaningful manner,' (case cited) 'for a hearing appropriate to the nature of the case,' Mullane v Central Hanover Tr. Co., 339 US 306, 313, 94 L. ed 865, 873, (1950). The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest ---" Boddie v Connecticut, 401 US 371, 378, 379; 28 L.Ed2d 113, 91 S Ct 780 (1971).

"A complaint should not be dismissed --- unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v Gibson, 355 U. S. 41, 45-46; 78 S.Ct. 99, 102, 2 L. Ed.2d 80 (1957).

"The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." Anderson National Bank v Luckett, 321 US 233, 246, 88 L Ed 692, 705, 64 S. Ct 599, 151 ALR 824.

When an Order is "opaque and unilluminating as to either the relevant facts or the law with respect to appellants' claim," and relates to the summary dismissal of a complaint, the Order should be vacated and the case remanded to the issuing court for further proceedings. Carter v Stanton, 405 US 669, 671, 672; 31 L.Ed2d 569, 572 (1972).

Was the District Court's action the imposition of a sanction? Assuming it was, should not a lesser sanction and its possible effectiveness have been considered? There is no Circuit known to plaintiff that does not take the position that "Dismissal with prejudice is the harshest of sanctions and should be imposed only after considering lesser sanctions." Violation of this rule is an abuse of discretion and subjects the case to remand in any Circuit as far as can be determined.

The rule in the Third Circuit goes even further: "But the law of this circuit is that Rule 41 (b) dismissal should

be reserved for cases where there is a clear record of delay or contumacious conduct by the plaintiff. Furthermore, it is necessary for the district court to consider whether lesser sanctions would better serve the ends of justice. (case cited)" Pickel v U. S. 746 F2d 176, 182 (1984): Third Circuit.

Conflict with decisions of other Courts of Appeals will compel the Supreme Court to grant certiorari for review of a decision of a Court of Appeals. F.T.C. v Flotill Products, Inc., 88 S. Ct 401, 389 US 179, 19L Ed2d 398 (1967).

CONCLUSION

The case should be remanded to the District Court for the Western District of Pennsylvania for further proceedings incorporating notice, hearing and findings in connection with the Court's judgment of Dismissal with Prejudice including consideration of a lesser sanction, and its possible effectiveness, if a sanction is the purpose of the Court's action after further deliberative consideration.

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PROCEEDINGS

Transcript (in part) of conference commencing on Thursday, September 24th, 1987, United States District Court, Pittsburgh, Pa., before Honorable Paul A. Simmons, District Judge.

Reproduction begins at line 7 on 4th page of transcript for that conference and continues without deletion through page 9. There were 11½ pages of transcript for that meeting.

The reproduced portions include everything the Court said in explaining the basis of the Dismissal with Prejudice.

TRANSCRIPT

THE COURT: --- The evidence is clear. The Defendant gas company has said they are not going to make you spend any money out of your pocket. They have said so on the record through their attorney. There is no damages at all that are possible in a lot of your averments in Paragraph 2 because there is no expense going to be on you to do anything, other than to allow your house to be open so they can change and replace the meter in order to safely bring gas onto your premises.

Now, that is clear. Now, in light of the Court's knowledge and conclusion that there is a Public Utility Commission, you have a remedy at law, plus the fact there's absolutely no damages here at all, that this --

that can possibly be claimed by you, Mr. Richardson, the Court is hereby and for the reasons herein stated on the record, we're dismissing your case at this time, with prejudice, because you have suffered no damage and the gas company has assured me that you will not in the future suffer any damage.

They have not moved your meter; you admit that. Your meter is still in the same place it was when you started this lawsuit. You do not have to put any service lines in at your expense. You do not have to make any alterations in your service line. And as a result of the fact that everything that you have stated in your averment here is not true because you have suffered no expenses, you have suffered no damages; and if you have suffered damages and expense, you have a remedy with the Public Utility Commission; and you can appeal their decisions to the proper appellate court, probably the Commonwealth Court; and you have a remedy, and this Court will abstain under those circumstances from exercising its jurisdiction.

So, the Court will put this in writing. We're going to dismiss your complaint. Let the record show that this Court has gone out of its way to give you an opportunity to have a lawyer. You do have a lawyer here, but he will not, for reasons known to himself and yourself, enter his appearance.

Mr. Bertani, Dante Bertani, a duly licensed lawyer, is here in the courtroom. He will not or has not, even

though requested by the Court, he has not entered his appearance in this case; and the Court feels that we have gone out of our way in -- this is the third or fourth session -- to try to be courteous and proper and to give your case every possible consideration; but there's no damage here.

The gas company has stated on the record that they will not change your meter as far as location of service lines are concerned. They will merely replace the meter because of obsolescence, at no expense to you, Mr. Richardson. So your case is dismissed, and that's the end of it.

MR. RICHARDSON: May I respond to that for the record?

THE COURT: Just a second. You have the right to appeal to the Court of Appeals if you wish.

MR. RICHARDSON: I'm going to appeal, yes.

THE COURT: You may do this. But the Court is going to abstain for the reasons I've said. You have a remedy at law in the state courts, administrative remedies; and secondly, you have suffered no damages; and thirdly, the gas company on the record has indicated to me that there is no expense on you or proposed expense that would cause you to have to spend any of your money in any way, shape or form in this case. And there's no inconvenience at all other than the fact that

you have to open your doors to allow them to change obsolete meters.

You have to do that every 15 years; is that correct, Mr. Brooks?

MR. BROOKS: Well, every 12 to 20 years, depending on the type of meter.

THE COURT: At least every 12 years you've got to change the meter.

MR. RICHARDSON: I'm never refused to open my doors to the gas company.

THE COURT: That's all they want to do, is change the meter. There will be no expense to you whatsoever.

MR. BROOKS: Your Honor, if I might point out something. In the course of changing the meter, they will test the lines, all the lines leading to the meter. In the event there is a leak on Mr. Richardson's private house line, that is his property, repairing that leak would be --

THE COURT: That's in accordance with Public Utility Commission rules.

MR. BROOKS: That's correct; that's not as a result of the meter change.

THE COURT: That's because of the fact for safety, they, the gas company, has to make sure to protect your life and your family's life, Mr. Richardson, from damages. They have to test the lines, which is only common sense.

So you haven't suffered one whit of damage. You will not suffer any damage in the future, other than potential damages which are required by the fact that you've got to change this meter every 12 years or so because of potential obsolescence or wearing out of the meter.

MR. RICHARDSON: I've never refused to let them to come in to do anything they have to do.

THE COURT: So there's no problem.

MR. RICHARDSON: They don't have to lie; they don't have to cheat in court.

THE COURT: I don't know anything about that. All I'm telling you --

MR. RICHARDSON: I'm telling you, Your Honor.

THE COURT: There is no discernible damage. I have concluded this. I can't possibly, after reading all of the complaints, after hearing all of the -- your position and the gas company's position, and the gas company's statement, there's absolutely no damage that you've

suffered here that's cognizable in this court. And besides, you have a remedy with the Public Utility Commission, and the Court should abstain under those circumstances until you have exhausted any remedies that are given to you under the state law under the circumstances; so we're dismissing this case, and we'll have a written order to that effect, dismissing your claim for reasons stated on the record.

We will have this record transcribed, and that's the end of this case.

MR. RICHARDSON: I want to add one question, Your Honor. I have not been given -- I don't mean to make you angry or anything like that.

THE COURT: No, no; you're not making me angry.

MR. RICHARDSON: They might be completely sincere, I don't know. I've not been given fair treatment. I have not been given fair treatment.

THE COURT: I don't know what more treatment you want. Nobody's hurting you.

MR. RICHARDSON: I want exemplary damages. These people -- an example should be made of these people for what they've done.

THE COURT: What did they do to you? Nothing.

MR. RICHARDSON: They lied in court.

THE COURT: Your meter is still where it always was; they didn't take it out, didn't make you change.

MR. RICHARDSON: The meter is just a by-product of this thing. This is what prompted them to go -- to take me to court, to force me into court; and then to come down there and then -- and under oath say that they wrote me a letter that had a lie -- had lies in it; they had never been to my house at all again that night.

THE COURT: That's neither here nor there.

MR. RICHARDSON: I don't have a jury --

THE COURT: The point is you don't have to make any alterations to your line, as you allege; that the meter is not going to be changed. It's not going to be put outside, so you have no damage as far as this Court is concerned.

MR. RICHARDSON: I demand the right to amend - to have my attorney amend the matter.

THE COURT: The case is dismissed, and you have ---.

End of Transcript

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(Usual Heading For Civil Action No. 85-2641)

ORDER OF COURT

AND NOW, this 29th day of September, 1987, after consideration of the record and the contentions of the parties, and for the reasons set forth in the record of this case,

IT IS HEREBY ORDERED that Plaintiff's case is DISMISSED WITH PREJUDICE.

PAUL A. SIMMONS
UNITED STATES DISTRICT
JUDGE

cc: Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3697

(Usual Heading)

(Civil No. 85-2641 - W.D. Pa. - Pittsburgh)
DISTRICT JUDGE: Honorable Paul A. Simmons

Submitted Under Third Circuit Rule 12(6)
April 27, 1988

PRESENT: SEITZ, COWEN and GARTH, Circuit Judges.

JUDGMENT ORDER

After consideration of the contention raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

ORDERED appellees are granted attorneys' fees of $150 because of the frivolous nature of the appeal.

Costs taxed against appellant.

By the Court:

Circuit Judge

ATTEST:

Sally Mrvos, Clerk

DATED: MAY 19, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3697

(Usual Heading)

Appeal from the United States District Court
for the Western District of Pennsylvania
(Civil Action No. 85-2641)

SUR PETITION FOR REHEARING

Present: GIBBONS, **Chief Judge,** SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and GARTH, **Circuit Judges.**

The petition for rehearing filed by appellant, William B. Richardson, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Circuit Judge

DATED: JULY 1, 1988

(2)

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No. 88-469

In the Supreme Court of the United States

October Term, 1988

WILLIAM B. RICHARDSON,
Petitioner,

v.

THE PEOPLES NATURAL GAS COMPANY, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PEOPLES NATURAL GAS COMPANY AND GERALD A. WILSON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

This action and related proceedings before the Pennsylvania Public Utility Commission ("PUC") and the Commonwealth of Pennsylvania had their origin in a notice from appellee, The Peoples Natural Gas Company ("Peoples"), to Petitioner William B. Richardson advising Richardson that Peoples intended, at its expense, to test the gas meter located in Richardson's residence.[1] Apparently fearing that a test of the meter would reveal a defective service line and, further, prompt a request by Peoples that the meter be relocated to the exterior of his residence, Richardson filed a complaint with the PUC[2] seeking an order directing Peoples to refrain from requesting a relocation of the gas meter.

Following hearings before the PUC, an order was entered directing Richardson to permit Peoples access to the meter for purposes of conducting the required tests and, if necessary, installing a remote reading device on the meter and directing Peoples to adhere to Peoples' customary standards in determining whether or not to demand relocation of the meter (Appendix, pp. A—2-3).[3]

Richardson appealed to the Commonwealth Court of Pennsylvania June 28, 1985.

---

[1]Periodic testing, and if necessary, replacement of obsolescent meters, is mandated by statute. 52 Pa. Code §59.21 (Appendix, p. A-1). In conjunction with the testing of the meter, the property owner's service line to the meter is also tested in order to assure that the line is capable of transmitting natural gas safely. In the event the service line leaks or is otherwise defective, the customer must replace the line before service may be restored. The meter is the property of the gas company; the service line belongs to the property owner.

[2]*Richardson v. The Peoples Natural Gas Company*, No. Z-8470299.

[3]*See* 52 Pa. Code. §59.18 (Appendix, p. A-1)

Upon Richardson's failure to respond to a motion to dismiss filed by the PUC, the Commonwealth Court dismissed Richardson's appeal March 21, 1986. In response, Richardson filed a petition in the Commonwealth Court that was treated by that court as a motion for reconsideration. In that motion Richardson complained of the conduct of the PUC proceedings and included, by reference, the allegations of the instant complaint which plaintiff filed in the lower court November 4, 1985.

The Commonwealth Court denied reconsideration in an order dated April 11, 1986. No appeal was taken from the order of the Commonwealth Court.

As a result of the filing of the complaint in the district court and the pendency of the related appeals, and despite the determination in the administrative proceedings that Peoples' conduct was appropriate and in accordance with law, no further action had been taken by Peoples to enter Richardson's residence for the purpose of testing, and if necessary, replacing the gas meter. No alterations of any kind have been made by any party either to the gas meter or service line.

Following service of the complaint in the district court, all defendants filed motions to dismiss. The motion filed on behalf of Peoples and Gerald Wilson, a Peoples employee, requested a dismissal of the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, averring, *inter alia*, that the complaint failed to allege a cause of action upon which relief can be granted.

Following four status conferences before the district court, the district court entered an order on September 29, 1987 dismissing the complaint. Richardson took an appeal

to the United States Court of Appeals for the Third Circuit.

Upon the filing of Richardson's appeal, Peoples moved for counsel fees and costs pursuant to 28 U.S.C. §1912 and Rule 38 of the Federal Rules of Appellate Procedure. The court of appeals entered an order on May 19, 1988 affirming the order of the district court and awarding Peoples $150 as counsel fees based on the frivolous nature of the appeal. Richardson filed a petition for rehearing in the court of appeals which was denied in an order dated July 1, 1988.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari presents no basis for the exercise of this Court's discretion to review this matter. None of the elements enumerated in Rule 17 of the Rules of the Supreme Court are involved in this matter nor asserted by petitioner. This case does not involve a substantial question of general importance. Instead, this matter simply involves a property owner unhappy at the prospect that a test of his gas service line, done in conjunction with a statutorily-mandated gas meter inspection, may reveal defects in the line, necessitating repair.

Richardson's complaint was properly dismissed pursuant to Rule 12 of the Federal Rules of Civil Procedure for a variety of reasons. Richardson initially prosecuted this action in state administrative proceedings and, on appeal, to the Commonwealth Court of Pennsylvania. Those state proceedings terminated in judgments adverse to Richardson. Richardson did not appeal to the Pennsylvania Supreme Court. Richardson's complaint improperly seeks to invoke the jurisdiction of a federal district court to review state court decisions and, as such, was properly dismissed. Furthermore, the complaint is purely speculative and seeks to recover monetary damages for a purely hypothetical or prospective "injury" and otherwise fails to state a claim upon which relief may be granted by inappropriately relying upon statutes intended to combat racial or class discrimination.

The complaint was also properly dismissed since the complaint seeks to litigate issues and claims asserted by Richardson before the Pennsylvania Public Utility Commission and the Commonwealth Court of Pennsylvania. The state proceedings terminated in final judgments adverse to Richardson and, consistent with theories of

judicial economy, *res judicata* and collateral estoppel, Richardson may not seek to relitigate the same issues and claims in federal court.

ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI PRESENTS NO SPECIAL OR IMPORTANT REASONS FOR THE EXERCISE OF THIS COURT'S DISCRETION TO REVIEW THIS MATTER

The Petition for Writ of Certiorari does not present issues of special or general importance beyond the interests of the parties to this action. The Petition cites no lack of uniformity or conflict among the courts of appeal or any departure from the usual course of judicial proceedings. This action was dismissed following the filing of motions to dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure. As discussed more fully below, the dismissal of this action pursuant to Rule 12 was entirely appropriate. Reduced to its essence, this matter involves merely a utility customer unhappy at the prospect that a test and/or replacement of the utility's meter may reveal defects in the customer's service line that may make repairs or alteration to the line by the customer necessary for the continuation of service.

As made unequivocally clear by Richardson's "Motion In Opposition to Dismissal," filed both in the Commonwealth Court of Pennsylvania and in the lower court, Richardson asserted the identical "overriding . . . constitutional precepts" (Appendix, p. A-5) in both the state administrative and state court appellate proceedings as in this action. In addition, the identity of issues presented in the state proceeding to those in the present action warrants dismissal on the basis of the doctrines of *res judicata* and collateral estoppel. The complaint filed in

the lower court is merely an attempt to invoke the jurisdiction of the district court in review of state court proceedings. Richardson did not proceed with further appeals in the state courts, choosing instead to initiate an action in federal court. It is axiomatic that if the constitutional claims presented in an action in federal district court are "inextricably entwined" with a state court's prior denial of those same constitutional claims, the district court lacks jurisdiction to review the state court decision. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-84, n. 16 (1983). Merely casting the complaint in the form of a civil rights action is insufficient to overcome the lack of jurisdiction in the district court to entertain matters disposed of in prior state court proceedings. *Hagerty v. Succession of Clement*, 749 F.2d 217, 220 (5th Cir. 1984).

The complaint seeking a review in the lower court of decisions in state proceedings adverse to Richardson was properly dismissed.

II. THE COMPLAINT WAS PROPERLY DISMISSED ON THE BASIS OF FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A. Richardson Has Not Suffered Any Loss for Which Damages Are Recoverable at Law

The complaint was properly dismissed pursuant to Rule 12(b)(6) for failure to state a cause of action upon which relief can be granted for the simple fact that Richardson has not suffered any loss, economic or otherwise. While the complaint alleges that the various defendants "conspired to manipulate a situation whereby the plaintiff must, at his expense, make alterations in the service line," the complaint is devoid of any allegation that Richardson

has in fact incurred any injury whatsoever. The complaint appears to address, as to appellees Wilson and Peoples, purely anticipated, prospective or hypothetical injury. Richardson seeks monetary damages to redress an "injury" that has not occurred. Clearly, the complaint is speculative and premature.

Richardson is apparently contending that, since he is alleging a violation of constitutional rights, he is entitled to a recovery of monetary damages in the event he should prevail in his claim (Petition, p.7). If so, Richardson's contention has been rejected by this Court in *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986), wherein this Court held that when parties seek damages for violation of constitutional rights, "the level of damages is ordinarily determined according to principles derived from the common law of torts." *Id.* at 306. Since damages in tort cases are intended to serve as compensation for injury actually incurred, a plaintiff is not entitled to "damages" based wholly on the "abstract value of a constitutional right." *Id.* at 307.

B. The Complaint Does Not State a Cause of Action for Which Relief Can be Granted Pursuant to 42 U.S.C. §1985

Richardson contends, in part, that federal court subject matter jurisdiction is appropriate pursuant to "28 USCS sect. 1343(1)(2)(3)" (Appendix, p. A-10).[4] Richardson's reliance on 28 U.S.C. §1343, and by necessary extension, upon 42 U.S.C. §1985, is misplaced. Section 1985 is intended only to redress injury caused by class or racially based discrimination. *See Griffin v. Breckenridge*, 403 U.S.

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[4]Presumably Richardson intended to invoke 28 U.S.C. §§1343(a)(1), 1343(a)(2) and 1343(a)(3).

88, 102 (1971). The complaint contains no allegation that Richardson was discriminated against because of class-based or racially discriminatory animus, nor do any facts appear from the complaint from which the court could reasonably infer conspiratorial acts motivated by such animus.

If Richardson seeks to invoke the provisions of §1985(3) and 42 U.S.C. §1343(a)(3) in his conclusory allegations of a conspiracy to deprive Richardson of a variety of constitutional protections with the aim of causing Richardson to incur expense in the alteration of his gas service line (Appendix, p. 60), such reliance is misplaced.[5] Section 1985 was enacted in order to combat the prevalent animus against Blacks and their supporters in the struggle to achieve civil rights following the Civil War. *United Brotherhood of Carpenters v. Scott,*, 463 U.S. 825, 836 (1983). In order to make out a cause of action under §1985(3), the plaintiff must allege a racial or other class-based invidious, discriminatory animus underlying the conspirators' action. *Id.* at 835. The complaint alleges no racial or political motive underlying the defendant's "conspiracy" and may be liberally read only to allege merely an economic "conspiracy." Conspiracies motivated by an economic animus were held by this court in *Scott* to be outside the purview of §1985(3).[6] *Id.* at 837. As such, no cause of action is stated pursuant to 1985(3) and dismissal of any claim based on that statute is appropriate.

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[5]28 U.S.C. §1985(3) provides for the recovery of damages incurred as a result of a conspiracy to deprive a person of the equal protection of the laws.

CONCLUSION

For the foregoing premises, the Petition for Writ of Certiorari should be denied.

APPENDIX

52 Pa. Code.

§59.18 Location of meters.

Meters shall be installed in either of the following locations:

1. Inside the building, preferably in a dry, well-ventilated place not subject to excessive heat, and as near as possible to the point of entrance of the pipe supplying service to the building.

2. Outside the building at a location selected by the utility. A meter cover or housing is required if, in the judgment of the utility, conditions require the physical protection for the meter installation.

§59.21 Meter tests.

a. Test schedule for other than Class A, B and C meters. Each public utility shall make and record tests of orifice, rotary displacement and turbine type service meters as follows:

* * *

2. Rotary displacement meters shall be tested and calibrated at the factory in accordance with recognized and accepted practices and shall be correct to within 1.0% when passing gas at their rated capacities. A record of the test shall be made available to and retained by the utility for the life of the meter. At least once every 10 years a differential-rate test shall be made and the results checked against the original test recorded at the time of installation. At least every two years the meter shall be inspected to observe the condition of the meter bearings—noise, vibration, and the like—and the level and condition of the oil in

the reservoirs. An observed problem shall be promptly corrected. A record of the results of these two-year tests shall be maintained by the utility for a period of ten years. In lieu of a differential-rate test, a test method approved by the Commission may be used.

ORDER

IT IS HEREBY ORDERED for the reasons stated in the accompanying discussion:

1. That The Peoples Natural Gas Company shall promptly contact Mr. William B. Richardson by letter advising him of the person's name and telephone number for him to contact in order to schedule a pressure test of his gas line and a meter change.

2. That Mr. William B. Richardson shall contact, and reasonably cooperate with, the personnel of The Peoples Natural Gas Company who are responsible for scheduling pressure tests and the changing of meters.

3. That Mr. William B. Richardson shall permit personnel of The Peoples Natural Gas Company to enter his residence at a mutually convenient time for the purposes of testing the gas line between the gas meter and the curb valve and of changing his gas meter, and, if indicated, consistent with Paragraph 4 of this Order, installing a remote reading device on his gas meter.

4. That the personnel of The Peoples Natural Gas Company shall apply its usual practices, procedures, and guidelines in assessing Mr. Richardson's circumstances and in determining the location for the gas meter for Mr. Richardson's residence.

5. That his Order shall not preclude The Peoples Natural Gas Company from using any remedy provided by law or regulation in order to apply, in Mr. Richardson's circumstances, the service practices it uses in the usual course of its business.

February 5, 1985

/s/ James D. Porterfield

JAMES D. PORTERFIELD
Administrative Law Judge

IN THE

Commonwealth Court of Pennsylvania
Sitting in Harrisburg

WILLIAM B. RICHARDSON,
Petitioner
vs
PENNSYLVANIA UTILITY COMMISSION

No. 1757 CD 1985

MOTION IN OPPOSITION TO DISMISSAL

AND NOW comes the petitioner, William B. Richardson, and moves for cancellation of the order of the Commonwealth Court of March 21st, 1986 (attached), and hereby presents his answer to the Motion to Dismiss filed by the respondent, the Pennsylvania Public Utility Commission (PUC), based on the Rules of Appellate Procedure prescribing time limitations for the filing of briefs with this honorable Court.

1. The petitioner for several months now has not prepared a brief in support of his petition. He will not prepare such a brief at this time because there is first a matter of putting false evidence in proper perspective. Until such is done, the petitioner cannot proceed to base his arguments on evidence accepted by the PUC when he believes The Peoples Natural Gas Company's (PNG's) only witness was discredited. The Administrative Law Judge (ALJ) believed this witness was credible.

2. Examples of incredibility: the transcript shows that the witness read into evidence a letter he had written to the petitioner and this letter was read with every intention that

it was the witness' testimony: He said: "Our servicemen have made several attempts to change your gas meter but found no one home on each occasion." This statement is false. This statement appears at page 21 of the transcript, lines 14 through 16. He was not questioned about this until page 41 (L. 21) where the ALJ asked the witness if he could testify whether he made any attempts to change the meter other than the two letters he read into the evidence. It then became clear that the witness had never sent anyone and that he had no personal knowledge of anyone ever failing to gain entrance at the petitioner's house. See page 42 which is taken up entirely by the witness in explaining the letter and ending up top of page 42 with "—historically we can't get ahold of these people anyway, so I would say, no, I did not—." The foregoing is not the only false statement in this case.

3. The over-riding of constitutional precepts by the PUC projects a picture of the same thing happening again at a bench hearing. The petitioner has filed in Federal Court and has asked for a jury where, hopefully, he will receive more honest treatment. A copy of the federal complaint is attached. The petitioner believes the Commonwealth Court should require an answer or response to each paragraph of this Motion and *review the record with whatever follow-up action it deems appropriate.*

ARGUMENT IN SUPPORT OF RECOMMENDED ACTION

4. Article 5 Section 10 para. (c) of the Pennsylvania Constitution delegates power to the Supreme Court of Pennsylvania to make rules governing practice, procedure and the conduct of all courts. But this is *not* an absolute grant of power. Some of this power is taken away where

substantive rights are in issue and where operation of the rules deny such rights.

> para. (c), Art 5 Sect. 10: "—if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant."

5. The time delay in filing petitioner's brief is waivable even under the Rules. Refer to the "Explanatory note—1979" under Rule 1511 of Rules of Appellate Procedure.

6. There is a statutory right of appeal from an Administrative Agency:

> Title 42 Pa. C.S.A. Sect. 702. "Any person aggrieved by an adjudication of a Commonwealth Agency—shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals—."

The undeserved credence given the PNG witness was gross prejudice. Such unreasoned distinctions injected into agency decisions deny open and equal resolution of grievances. Under such circumstances, the right of appeal is meaningless unless the Commonwealth Court can exercise some modicum of ethical control.

7. Unreasoned distinctions and the exercise of power and authority which the legislature never intended—and never expressly conferred nor implied—has been the hallmark of this case in the PUC. The Amendment I right of the petitioner to petition for a redress of grievance has certainly been abridged—along with other rights—but it is remarkable that the Amendment I abridgment is clearly visible simply by reading the complaint and answer before the PUC and then trying to apply the Order of the PUC.

8. The Order of the PUC affects the petitioner's personal and property rights. This Order also affects the personal and property rights of thousands of PNG's customers. Nowhere does the Administrative Law Judge cite authority for such an Order in the context of the pleadings which he undertook to address. Couple this with the fact that the credibility of the testimony on behalf of The Peoples Natural Gas Company was nil and irrelevant in its effort to uphold what it had alleged in its answer in response to petitioner's complaint.

INCLUSION BY REFERENCE IN THIS MOTION

9. The petitioner hereby includes by reference the allegations of the attached complaint filed by the petitioner in the Federal District Court in Pittsburgh as though such allegations were set out in full herein.

CONCLUSION

10. The abuses of the Pennsylvania Utility Commission reflected by the record in this case should be addressed by the Commonwealth Court in its capacity as monitor of agency action and should, upon its own motion, undertake a study of this particular case before the PUC due to allegations made by the petitioner relating to the hearing of November 5, 1984, that the Gas Company (PNG) witness testified falsely and may come under Title 18 Pa. C.S.A. Sect. 4902 or 4903.

Respectfully submitted,

WILLIAM B. RICHARDSON
149 Westmoreland Avenue
Greensburg, PA 15601

I hereby certify that I am by first class mail postage pre-paid serving a true and correct copy of this MOTION IN OPPOSITION TO DISMISSAL upon the Pennsylvania Public Utility Commission, the Attorney General of Pennsylvania, The Peoples Natural Gas Company, and the United States District Court for the Western District of Pennsylvania on April 8th, 1986, addressed as follows:

GLORIA A. TISCHUK, ESQUIRE
Deputy Attorney General
564 Forbes Avenue
Pittsburgh, PA 15219

Clerk of Court, U.S.
District Court
U.S. Post Office &
Courthouse
Pittsburgh, PA 15219

TERRYL A. MORELAND,
ESQUIRE
Pennsylvania Public Utility
Commission
P.O. Box 3265
Harrisburg, PA 17120

JEFFREY G. BROOKS, ESQUIRE
ECKERT SEAMANS CHERIN
& MELLOTT
600 Grant Street, 42nd Fl.
Pittsburgh, PA 15219

IN THE

United States District Court

FOR THE

Western District of Pennsylvania

WILLIAM B. RICHARDSON,
Plaintiff

vs

GERALD A. WILSON, Customer's Service Foreman and his employer, PEOPLES NATURAL GAS CO.; JOSEPH FARRELL, Director, Bureau of Consumer Services and his employer, PENNSYLVANIA PUBLIC UTILITY COMMISSION; the Administrative Law Judge, JAMES D. PORTERFIELD; and SARA J. COHICK, Consumer Service Representative.

Civil Action No. 85-2641

COMPLAINT

1. The jurisdictional statutes are Title 28 USCS Sect. 1331 and Title 28 USCS Sect. 1343(1)(2)(3) and relevant Title 42 statutes, if any.

2. The defendants have, purposefully and intentionally and acting under color of law, conspired to manipulate a situation whereby *the plaintiff must*, at his expense, *make alterations in the service line into plaintiff's* house which breaches the original contract, does not enhance the gas

service in anyway, is contrary to law, and has been supported only by invalid evidence including lies, slander and libel.

3. The defendants have, purposefully and intentionally and acting under color of law, conspired to deprive the plaintiff of his constitutional protection against the:

a. right to due process and equal treatment.

b. impairment of contract.

c. right of free association.

d. preservation of property and reputation.

e. Amendment I guarantee against vindictive or unresponsive State action relative to a petition for redress of grievance.

4. The defendant Administrative Law Judge for the Public Utility Commission, purposefully and intentionally and acting under color of law, conspired to deprive the plaintiff of his due process rights by rendering an order following a hearing on November 5th, 1984, in which the plaintiff herein was complainant and the gas company was respondent and which order was *entered in the record beyond the statutory time limit*, it was also unresponsive to the pleadings, unsubstantiated by the evidence, unsupported by subject matter jurisdiction, reflective of an unfair trial, and in violation of the plaintiff's Amendment I right to petition for a redress of grievance.

5. The defendant Administrative Law Judge, purposefully and intentionally and acting under color of law, conspired to deprive the plaintiff of his due process rights by being neither neutral nor detached but displayed bias and prejudice and acted on matters aside from the matters put

in issue by the complaint and answer, treated the gas company as though it was the Amendment I petitioner when such is impossible, instituted "off the record" discussions during the hearing designed to fortify the gas company's case, dismissed the plaintiff's complaint and instituted a judgment order for the gas company in a form of relief for it which was neither set out by way of complaint or in the course of hearing and, in so doing, violated the right of the plaintiff to pre-trial notice required to acquaint him with the issues to be decided.

PRAYER FOR RELIEF

A. That a jury be impaneled to try the cause for damages.

B. That the plaintiff have $10,000.00 compensable damages.

C. That the plaintiff have $10,000.00 punitive damages.

D. That the plaintiff have such other or additional award for his time, costs and expenses associated with the State litigation as well as with this litigation along with such other, additional or alternative relief as may appear to the Court to be equitable.

WILLIAM B. RICHARDSON
149 Westmoreland Avenue
Greensburg, Pennsylvania 15601

SUPREME COURT, U.S.
FILED
NOV 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

No. 88-469

WILLIAM B. RICHARDSON,
Petitioner

v.

THE PEOPLE'S NATURAL GAS CO., et AL
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

WILLIAM B. RICHARDSON, *pro se*
149 Westmoreland Avenue
Greensburg, PA 15601

The Palace Printer, Greensburg, PA 15601

REPLY BRIEF

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PETITIONER'S COMMENT ON GAS COMPANY'S "COUNTER STATEMENT OF THE CASE"

The first sentence of the "Counter Statement" at page #1 of the Gas Company's Brief in Opposition to the Petition for Certiorari is not correct. The first communication to the petitioner was a letter stating: "Dear Customer, we're required by the Pennsylvania Public Utility Commission to change all meters periodically. Our servicemen have made several attempts to change your gas meter but found no one home on each occasion. - - - " The foregoing is from the Customer Service Foreman's testimony at the Public Utility Commission (hereinafter PUC) hearing November 5th, 1984. This letter was sent by him. Documented at the same hearing was the untruthfulness of the "several attempts to change" the Gas Meter. (the transcript of the PUC hearing was filed with the District Court at the first session, November 21, 1986. The petitioner has made strenuous effort to get the Court to file this transcript with the official record but to no avail. The same effort applies to two briefs filed with the District Court. The Court refuses to comply with Rules 5(d) and 5(e) of the Rules of Civil Procedure. (See page 8, Petition for Writ of Certiorari).

The petitioner has never seen any statute, rule, or regulation which required the Gas Company to "change all meters periodically." It is remarkable that nothing appears in the Gas Company "Brief in Opposition" to substantiate this alleged requirement. According to the Gas Company attorney (Brooks), speaking for the record (Appendix, A-4, Petition for Writ of Certiorari), a meter must be changed "every 12 to 20 years." **Now he says in his Brief in Opposition to the Petition for Certiorari that on April 24, 1984, when this all started, that all the Gas Company wanted to do was "to test the Gas Meter."** Petitioner got a different story in 1984!

According to the Pennsylvania code (59.21, note 1, bottom page 1, Brief in Opposition), the only requirement is "periodic testing" with replacement only of "Obsolescent meters." There was no testimony at the PUC hearing that petitioner's meter was obsolete or defective. Testing of the meter has been accomplished.

The Gas Company had only one objective in 1984 and that was to get the meter moved to a location it would designate outside the house and to have the cost of relocating the meter borne by the petitioner. This relocation expense is, by law, the obligation of the Gas Company (see page 8, Petition for Certiorari; also, see this Reply Brief heading titled: "THE STATE LAW: CHARACTER OF SERVICE AND FACILITIES")

This is a big thing with the Gas Company. They want their cake and eat it to. The Customer Service section manipulates the customer into position to make the relocation at the customer's expense and this same Customer Service is financed by the customer (bottom page 7, Petition for Certiorari). If he uses no gas during a month, he still pays for the service.

This is a racket! The PUC knows it and it is obvious from this case that an Administrative Law Judge believes it is his duty to cooperate 100% with the Gas Company in its illegal endeavor. In perpetuating this manipulative policy, the Gas Company and PUC defendants committed the constitutional violations set out in the petitioner's complaint (see A-9 thru A-11, Brief in Opposition); primarily, they were committed in course of pleading, hearing, and subsequent administrative appeals; although, the two nonjudicial persons named defendants as PUC employees were implicated by acts prior to petitioner filing for hearing with PUC.

The Gas Company uses the word "apparently" as license to misrepresent the facts in its Brief in Opposition then repeats these misrepresentations as though etched in stone. To reinforce its self-serving presumptions, the Gas Company uses documents that were attached to Motions to Dismiss and never converted to Motions for Summary Judgment in the District Court. In order for these documents (A-2 thru A-8, Brief in Opposition to Petition for Writ of Certiorari) to be presented as evidence in any Court, Rule 12(b) (6) and Rule 56 must be complied with.

A Rule 12(b) (6) Motion to Dismiss with appended documents which purport to be matters outside the pleading, does not automatically become a Motion for Summary Judgment. The Gas Company presupposes otherwise. No where in the transcripts or records of this case have any of these documents been verified or recognized by the District Court as matters outside the pleadings.

At pages 7 & 8 of the Petition for Writ of Certiorari, the petitioner described, in general, the Gas Company's practice in dealing with its customers when it claims a periodic meter change is due. As to the petitioner, he was dealt with by the Gas Company more severely - more dishonestly. It was misrepresentation and threats from the very beginning culminating in what petitioner perceived as perjury during the hearing at the PUC.

The record of this case in the District Court shows that the petitioner-plaintiff did attempt to get prosecutors, including the Attorney General of Pennsylvania, to investigate for criminal liability - but to no avail.

THE STATE LAW: "CHARACTER OF SERVICE AND FACILITIES"

The Pennsylvania statute Title 66 Pa C.S.A. 1501 reads:

"Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this part and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service. - - - "

At the PUC hearing, the petitioner introduced a letter authorizing the Gas Company to come any time to make any repairs or changes necessary. No formal appointment necessary. The Gas Company has always had access to its meter in petitioner's house.

SUPREME COURT RULE 17 COMPLIANCE

Both the District Court and the Third Circuit Court of Appeals issued sua sponte grants of summary judgment. This is improper treatment of a pro se litigant. It is even worse when the Appeals Court taxes attorney fees and costs to its judgment - and even it is without findings.

Furthermore, the Third Circuit Court of Appeals by defaulting on its obligation to issue findings has overlooked the gross error of the district Court in issuing Dismissal with Prejudice without findings and has aggravated the lower Court's error by assessing attorney's fees and costs against the pro se litigant without findings leaving in limbo an important question of Federal law dealing with sua sponte treatment of the pro se litigant in constitutional and civil rights cases.

There does not seem to be any Supreme Court evaluation on the issue of sua sponte District Court dismissals with prejudice involving pro se plaintiffs.

Pro se plaintiffs are known to be in the never never land of too rich to qualify for legal help and too poor to afford competent help.

"A sua sponte grant of summary judgment should be avoided." **Brobst v Columbus Services Int'l**, 761 F2d 148, 154 (CA3, 1985). (petitioner's note: the foregoing **Brobst** statement applies in general. It would appear that opinion with findings and some explanation would be in order when a pro se plaintiff is dismissed on the merits of his case. This should be especially true when such a plaintiff believes his constitutional rights are involved.)

SOME CASE LAW NOTES

Since there is no Legitimate Rule 12(b) (6) motion in effect before the District Court, the Gas Company cannot exploit any of the alleged defenses set out in its brief in opposition for purposes of dismissal on the merits.

The issue of **EXHAUSTING STATE REMEDIES:** "Although the plaintiff did file an action in the Washington state court, arising out of her dismissal from the college faculty, that action was dismissed and appeal was not prosecuted. The complaint in this case was filed in the federal district court while the state proceedings were pending. At most, however, the pendency of the state action would allow the district court, applying the doctrine

of abstention, to hold the federal suit in abeyance while awaiting the outcome of the state action. It did not entitle the district court to dismiss the action with prejudice for lack of jurisdiction or for failure to state a claim." **Whitner v Davis** 410 F2d 24, 28 (CA9,1969,WA)

Take a look at RES JUDICATA or COLLATERAL ESTOPPEL which the Gas Company claims to be applicable. Even assuming there was a validly converted Motion governed by Rule 56 in effect below and sponsored by the Gas Company, these defenses would not be available because such is not apparent on the face of the complaint: see **Brown v Bellaplast Maschinenbau** 104 F.R.D.585, 587 (CA3, 1985)

Everything in the complaint indicates that the issues before the District Court arose from false testimony under oath, conspiracy, and flagrant abuse of power for which damages are sought. These are issues for which the PUC has no jurisdiction. Even if petitioner had pursued the case on appeal to the Commonwealth Court, the same would be true. At no time has any part of the controversy been heard on its merits in a court of law.

As to DAMAGES: At page 8 of the Brief in Opposition, a paragraph begins "Richardson is apparently contending that, since he is alleging a violation of constitutional rights, he is entitled to a recovery of monetary damages in the event he should prevail in his claim." The statement would be correct, according to the case the Gas Company cited, if the word "apparently" were removed and the word "nominal" substituted for "monetary". The **Memphis Community School Dist. v. Stachura** case held that "nominal" damages **were appropriate** for certain "absolute" rights and the right to procedural due process has been held to be "absolute" because "it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, the denial of procedural due process should be actionable for nominal damages without proof of actual injury." **Annotation to Memphis School Dist v Stachura**, 91 L. Ed.2d 647, 657 quoting from **Carey v Piphus** (1978) 435 US 247.

As to the Gas Company argument about the requirement of CLASS OR RACIALLY BASED DISCRIMINATION, the class is quite obvious. It is the Gas Company customers. The petitioner maintains the class is legitimate under title 42 USC 1985. There are three paragraphs to 1985: 1985(1), 1985(2), and 1985(3). Not all require the conspiracy to be against a class or with racially based discrimination. But even if 1985 should be ruled out altogether, the case law recommends resort to 1983, where applicable and especially if constitutional violations are involved. See **Holt Civic Club v Tuscaloosa**, 439 US 60,65,66 (1978); **Moore v City of Paducah** 790 F2d 557, 559 (CA6, 1986, Ky.);

CONCLUSION

In addition to the QUESTIONS PRESENTED FOR REVIEW (page #1, Petition for a Writ of Certiorari), the Gas Company has now created buffer issues designed to nullify petitioner's argument for review. There is no question but that the Dismissal with Prejudice was entered without proper regard to principles of case law and mandates of the Rules of Civil Procedure. As a result, the petitioner has been deprived of:

a. privileges and immunities accorded Citizens in the several states.
b. procedural due process
c. constitutional rights
d. civil rights

The Petition for Review on Certiorari should be accorded jurisdiction for review.

Respectfully submitted,

William B. Richardson
149 Westmoreland Ave.
Greensburg, PA 15601